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Published in:

Research handbook on the future of EU copyright

Publication date:

2008

Document Version

Publisher's PDF, also known as Version of record

[Link to publication](#)

Citation for pulished version (HARVARD):

Dusollier, S & Ker, C 2008, Private copy levies and technical protection of copyright: the uneasy accommodation of two conflicting logics. in *Research handbook on the future of EU copyright*. Edgar Elgar, Northampton, pp. 349-372.

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14 Private copy levies and technical protection of copyright: the uneasy accommodation of two conflicting logics

*Séverine Dusollier and Caroline Ker**

Introduction

The recourse to technology in the protection of digital copyrighted works has raised many questions. Some of these have been discussed at length, for example, the adequate scope of the legal protection of such technical measures against circumvention, the relationship between technical protection and copyright exceptions.¹ Other issues, such as the interoperability of technological protection measures or the inhibition of a normal playability of the work, are emerging both in the lawmaking and the scholarship arenas. Amongst those (so far) less discussed matters, lies a peculiar provision of the European Directive of 22 May 2001 on the harmonisation of copyright in the information society that requires Member States to take into account the development of technological protection measures (hereafter TPM) when determining the regimes of levies associated with the private copy exception.

Considering a possible link between TPM and the private copies levies seems at first sight a rather logical and merely technical process. When a technical device prevents the very making of a copy, the compensation that is collected for the possibility of making such a copy arguably loses its justification. Should the overall number of private copies decrease by reason of the increasing distribution of works wrapped in technical formats disallowing their reproduction, the amount of levies compensating the prejudice incurred for the rights owners would normally decrease accordingly.

However, the application of TPM and the level of private copy levies are

* This chapter is based on the results of a study commissioned by the Belgian Ministry of Economy on the consideration of technological measures of protection of copyright and levies system for private copying. The study, completed in December 2007, is not yet publicly available.

¹ On technological measures in copyright, see S. Dusollier, *Droit d'auteur et protection des oeuvres dans l'univers numérique*, Bruxelles, Larcier, 2nd edition, 2007; E. Becker et al. (eds.), *Digital Rights Management – Technological, Economic, Legal and Political Aspects*, Berlin, Springer-Verlag, 2003.

not strictly communicating vessels. Difficulties arise when looking at the practical implementation of such a rule, what has been in a first stage called the 'phasing-out provision',² as if the notion intended to indicate that the development of anti-copy mechanisms would progressively mean the relinquishment of the levies system. This chapter aims to analyse the European mandate for considering the technological measures protecting works against copying and the levies system, and ultimately at underlining the inherent contradiction of these two different logics.

We will first recall the foundations and operation of the private copy and of the system of levies in the European context (Section 1). Then, the principle of the so-called phasing-out provision and its characteristics will be assessed (Section 2). The phasing-out confronts the TPM and the levy system, which gives rise to some intricate issues (Section 3). In the last part of this chapter, we will propose a methodology, albeit partial, to carry out an adequate consideration of the presence of technological measures in the levies schemes with due attention to the rights and interests of authors and other copyright and related rights owners (Section 4).

1. The private copy and the regime of levies

1.1 The origins of the levy system

In the early 1950s, technical progress in methods of reproduction gave birth to the private copying exception.³ The advent of reprography and sound recording equipments enabled users to make copies of works, first literary and sound works, and eventually audiovisual ones, with great ease and of a passable quality. Very rapidly, copyright owners saw in this easy copying capacity and in this new role taken by the end-users of copyrighted works, a worrisome threat to the economic exploitation of their works.

A case involving a copy made within the private sphere was brought before the German Supreme Court as early as 1955.⁴ Albeit there existed, in German law, a limited exception for private copy, the Court held that such an excep-

tion had to be reconsidered in the light of the new technological development. It recalled that, as a principle, copyright did not stop at the threshold of the private sphere of users. However, protection of privacy stands as an obstacle to any copyright enforcement within that sphere. This case law prompted the German lawmaker, soon to be followed by other countries, to enact a new exception allowing for the private reproduction of works in the private sphere and for a strictly personal use.

It was indeed noted that the authors' confirmed power of decision on those copies was revealed to be ineffective since they took place in the private sphere of the user. The practical impossibility for an author of actually preventing the making of a copy by a user or for a transaction to take place to authorise such a copy in exchange for remuneration, suggested that a limitation to the rights of the author be recognized.

A primary justification for the private copy exception was thus based on market failure consisting in the unfeasible transaction between the author and the user regarding private copies. Privacy concerns also contributed to the enactment of the exception, as only intrusive means of control could contribute to restoring (albeit in a rather inoperative manner) the control of the authors over private acts of reproduction.

The economic loss resulting from the exception for copyright owners was compensated, in many European States, by the setting up of a levy system. Such a system imposes the collecting of a levy on blank media and/or copying devices acquired by users, as an indirect compensation for the copies made with such supports or equipments. In the recent European Directive on copyright in the information society, the Member States that provide for the private copy exception are required to organise a fair compensation for such copies, which can take the form of a levy system.⁵ Beyond that reference and suggestion, the levy systems for private copy are not harmonised at the EU level despite some attempts to that effect. The basis of the levy (copying devices and/or media on which it is levied), its amount, the person who has to pay the levy, as well as the distribution keys and methods, differ from one country to another.⁶

² See C. McCreedy, 'Address to the EABC/BSA Conference on Digital Rights' Management', 12 October 2005, available at <http://ec.europa.eu/commission_barroso/mccreevy/docs/speeches/2005-10-12/euam_en.pdf> (15 January 2008).

³ On the history of and the rationale for the private copying exception and the levies, see B. Hugenholtz, L. Guibault and S. Van Geffen, 'The Future of Levies in a Digital Environment', Amsterdam, Institute for Information Law, March 2003, p. 10, available at <<http://www.ivir.nl/publications/other/DRM&levies-report.pdf>> (15 January 2008).

⁴ BGH, 24 June 1955, *Mikrokopien* [1955] *GRUR*, p. 546. See also, BGH, 29 May 1964, *Personalausweise*, [1965] *GRUR*, p. 104.

⁵ S. Bechtold, 'Directive on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society', in T. Dreier and B. Hugenholtz (eds.), *Concise European Copyright*, The Hague, Kluwer Law International, 2006, p. 373.

⁶ For a comparative analysis of existing systems of levies in national laws, see S. Martin, 'Summary of the National Reports on the Questions Concerning the Regime of Private Copying in the Analog Domain', in *Creators' Rights in the Information Society*, Proceedings of the ALAI Congress, September 2003, Budapest, KJK-Kerszov Legal and Business Publishers Ltd., 2004, p. 206; W. Wanrooij, 'Remuneration Systems for Private Copying'; *ibid.*, p. 371.

From an economic point of view, the establishment of a levy system has permitted the creation of revenue for authors and other rights holders for such private copies, whereas the reproduction right was revealed to be totally fruitless. Private copies remuneration now amounts to a significant part of the revenues of some authors and, particularly, of performers, whereas this remuneration should normally be only additional to their primary sources of copyright revenues.

1.2 The characteristics of the levy system

A levy system does not aim to provide right holders with direct remuneration for the private copies that are made from their works. Indeed, the levies cannot be considered as the financial counterpart of the private copies realised, but are only a feeble substitute.

The levy system was conceived as a global compensation for the limitation made to the exclusive right to authorise the reproduction of works and other subject matters, when occurring within the private sphere of the users. Levy schemes seek to roughly compensate the global prejudice constituted by the exception and the resulting loss of monopoly and revenues for right holders.

This difference between a direct remuneration (which can only be achieved by the exercise of an exclusive right) and an indirect compensation (which intervenes when the exclusive right has been amputated) has many consequences.

It explains that the levy system is a form of rough justice, which cannot attribute to each author whose works have been copied the exact remuneration she could claim. The collected sums are justified by the inhibition of the right to prevent the making of private copies, which entitles the right holder to be compensated as an author, producer or performer whose rights have been limited, and not because of the private copies effectively made of works or other subject matter.

The levies paid by users when purchasing a blank medium or a recording device are equally abstracted from any private copy that they might carry out. Hence, the 'tax' is levied on any sale or importation of the media or devices concerned, irrespective of their actual use for private copying. Similarly, the amount of the levy is determined independently of the number of copies realised by the user with such material.⁷

Consequently, the fact that a levy has been paid by the users of a work

⁷ This is not inconsistent with linking the rate of the levy applicable to a blank medium to its recording capacity, as this variable arises from equity concerns. It may indeed be fair that the users who may make more private copies contribute in a greater manner to the compensation of the global prejudice due to the exception.

does not grant them a 'right' to that copy. The source of such a legal privilege (to avoid using the ambiguous terminology of 'right'⁸) is the copyright law itself when an exception for personal reproductions is provided for. This was recently confirmed by Belgian and French jurisdictions, which refused to grant a 'right' to the private copy to users on the ground of payment of the levy.⁹ Besides, the user is not entitled as a matter of principle to claim reimbursement of the levy he paid, even if he does not make any private copy with the acquired media or device. By paying the levy, the user participates in a solidarity system compensating for all private copying made on a specified territory.

Finally, the level of levies is normally determined by a collective negotiation between all stakeholders, whereas the exercise of exclusive rights is individual. It follows that the collection and repartition of the levies has to be organised collectively, generally by a collecting society, on behalf of all beneficiaries of this right to compensation.

The source of this approximate remuneration, explained as a mere compensation for the harm that the legal recognition of the private copy causes to the rights holders, is thus not to be found in the individual copy as allowed by the law, but in the global prejudice resulting from all private copies made by the users of copyrighted works.

The compensative nature of the levies is confirmed by the international and European legal framework.

At an international level, the levy system aims at complying with the so-called three-step test of the Berne Convention for the Protection of Literary and Artistic Works, which requires the exception provided by countries not to *unreasonably prejudice the legitimate interests of the author*. The establishment of a levy system is considered to provide an answer to that requirement,¹⁰ as it diminishes the prejudice of the author by providing a financial compensation. It is a matter for lawmakers to assess the prejudice created by each exception they enact and to set up a levies scheme or other form of compensation, when this prejudice, if left uncompensated, would be unreasonable.

⁸ L. Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright*, Information Law Series, The Hague, Kluwer Law International, 2002, p. 90.

⁹ In Belgium, see Civ. Bruxelles (cess.), 25 April 2004, *Auteurs et Media*, 2004, p. 338, note S. Dusollier. In France, see Paris (4th chamber A), 4 April 2007 (*Mulholland Drive*), *Communications – Commerce Electronique*, May 2007, p. 34, note C. Caron.

¹⁰ M. Senftleben, *Copyright, Limitations and the Three-Step Test – An Analysis of the Three-Step Test in International and EC Copyright Law*, Information Law Series, The Hague, Kluwer Law International, 2004, p. 237.

Besides the explicit inclusion of the three-step-test, the European Directive on copyright in the information society particularly stresses levies as a form of compensation for acts of private reproduction. Article 5(2), which allows Member States to provide for a private copy exception, also requires that a fair compensation be associated therewith. Recital 38 states that such a fair compensation can take the form of 'remuneration schemes' whose purpose is 'to compensate for the prejudice to right holders'. Recital 35 expands on that compensatory feature of the levy systems by stating that 'a valuable criterion [when determining the form and level of the compensation] would be the possible harm to the right holders resulting from the act in question'.

The 2001 Directive has recourse to the term 'compensation' when former EU legislation, as well as national laws,¹¹ sometimes refers to 'equitable remuneration'. In a decision of 6 February 2003,¹² the European Court of Justice interpreted the notion of the right to equitable remuneration enjoyed by performing artists and producers regarding the broadcast of phonograms. The Court ruled that the concept of equitable remuneration had to be 'in the light of the objectives of Directive 92/100 (...) viewed as enabling a proper balance to be achieved between the interests of performing artists and producers in obtaining remuneration for the broadcast of a particular phonogram, and the interests of third parties in being able to broadcast the phonogram on terms that are reasonable'. That case law seems to consider that the right to remuneration provided for by the Lending and Rental and Neighbouring Rights Directive does not have a compensatory nature per se but constitutes rather a direct remuneration for acts of use of the phonograms. One cannot infer from that ruling a clear definition of the levy system for private copies, even though most EU laws use the terminology 'right to remuneration' rather than 'fair compensation'. However, the ECJ stressed that the equitable character of the remuneration for a use covered by a limitation to copyright may be assessed in the light of the 'value of that use in trade',¹³ which brings the notion of 'equitable remuneration' closer to that of compensation: the standard of the value of the use mentioned by the court echoes the criterion of the potential economic harm referred to in the 2001 Directive.

¹¹ The terminology of 'right to remuneration for private copy' is used in Belgium and France for example.

¹² ECJ, 6 February 2003, *Stichting ter Exploitatie van Naburige Rechten (SENA) v. Nederlandse Omroep Stichting (NOS)*, C-245/00, *Rec. ECJ*, 2003, p. 1251, § 36.

¹³ *Ibid.*, at 37: 'As the Commission points out, whether the remuneration, which represents the consideration for the use of a commercial phonogram, in particular for broadcasting purposes, is equitable is to be assessed, in particular, in the light of the value of that use in trade.'

The level of the levy system should reflect the scale of use of the exception. The more numerous the uses exempted from authors' control are, the higher the global sum to compensate this amputation of their rights should be. Nevertheless, the levy, being not a remuneration for the use, will never amount to the exact economic value of the copy. The levy system is then not to be interpreted as providing an economic counterpart for those acts or copies themselves.

1.3 *The evolution of the private copy exception*

In the early 1990s, new technical progress challenged the private copying exception in a twofold way. On one hand, the capacity to make digital reproduction of works, increasingly within anyone's reach, now enables users to easily make copies of perfect quality at a low cost. Private copying, when it occurs in a digital format, likely harms the economic interests of the copyright owners to a larger extent than analogue reproduction.

On the other hand, the advent of technical protection measures (hereafter 'TPM') that hinder the reproduction of content has been said to restore the control of authors over copies made in the private sphere. This newly regained control of rights holders over the use of their works has led some to allege that the exception has lost its justification, market failure having been solved by technological measures, and that the reproduction right, which has recovered its efficiency, should be restored over private copies.¹⁴

The unprecedented quality of the copy and the technological enforcement of the reproduction right could have led to the suppression of the exception altogether. Although some proposals to that effect were made in the adoption process of the Directive on the harmonisation of certain aspects of copyright and related rights in the information society, article 5(2) finally maintains an optional private copying exception, encompassing both analogue and private copying, as it was also considered to contribute to balance right holders' and users' interests.

The condition of the preservation of the exception is however that fair compensation has to be organised by law and that the latter takes into account the possible application of technological measures having an effect on the

¹⁴ T. Bell, 'Fair Use v. Fared Use: The Impact of Automated Rights Managements on Copyright's Fair Use Doctrine', *NCL Rev.*, 1998, vol. 76, p. 584; M. Einhorn, 'Digital Rights Management and Access Protection: An Economic Analysis', in *Adjuncts and Alternatives to Copyright*, ALAI Congress report, 13–17 June 2001, New York, ALAI-USA, Inc., 2002, p. 94; A. Strowel, *Droit d'auteur et copyright – Divergences et convergences*, Bruxelles and Paris, Bruylant/LGDJ, 1993, p. 646 (admitting that technical progress may solve the transaction cost issue and allow the substitution of a voluntary licence regime for the compulsory licence regime).

private copy. This relationship between private copy levies and technological measures of protection has been called the 'phasing-out' provision.¹⁵

2. The phasing-out rule

2.1 Justification and legal framework

The coexistence of a system of levies with the application of TPM to certain works engenders a practical issue. When a technological measure is affixed to a copy of a work and prohibits the reproduction thereof, no private copy can be made of such a work. On a global scale, the deployment of anti-copy mechanisms is likely to reduce the number of private copies made by users. Whereas the levy system globally compensates the absence of control over copies made within the private sphere, the TPM restores such control, irrespective of the legitimacy of the private copy.

Since the collected levies are deemed to compensate the prejudice of the copyright owners due to those copies they cannot prevent, it might seem unfair that the amount of levies does not change while the number of copies is decreasing. The system of levies, as we have seen, reflects the number of copies that are made outside the exclusive rights arena, by reason of the exception granted to users. Consequently, even though the system can only be based on rough justice and does not correspond exactly to the remuneration that the author could get through exclusive rights, the levies should amount to an approximate evaluation of the global prejudice endured by the right holders.

Users may also feel that the levies they have paid become unjustified when a TPM effectively deters the making of private copies. Two hypotheses can be distinguished. Either a technical system totally prevents a user from making a copy of a work or it allows the copy against remuneration. In the first case, the user of the technically protected work might feel that she is paying, through the levy paid when acquiring blank media or a recording device, for a copy that she is not entitled to make; in the second, that she has paid twice for the same copy. In all these circumstances, the levy system may likely cause the impression of an undue or double payment in the user's mind. In both cases, the prejudice resulting from the private copy exception decreases either since no copy can actually be made or since the copy does not harm the copyright owner who has been remunerated for that copy through the operation of the technological measure, the prejudice having been internalised by the latter.

¹⁵ J. Reinbothe, 'The Legal Framework for Digital Rights Management', *Digital Rights Management Workshop*, Brussels, 28 February 2002; J. Samnadda, 'Technical Measures, Private Copying and Levies: Perspectives on Implementation', in Tenth Annual Conference on International Intellectual Property Law & Policy, Fordham University School of Law, 4–5 April 2002.

This objection has inspired the so-called *phasing-out* provision of the Directive on copyright in the information society, which requires Member States that recognize the private copying limitation to take into account the application or the non-application of technological measures in the compensation system they are bound to establish. This underlined relationship between the deployment of TPM and the level of levies appears in article 5(2) of the Directive, which deals with the private copy exception, as in recitals 35 and 39. Most EU Member States have transposed this provision into their laws. Fewer are the countries who have effectively started to consider the technological measures in their levy schemes.¹⁶

2.2 The characteristics of the phasing-out principle

It should first be stressed that the phasing-out rule should not be understood as a pretext for dismantling the levy systems, however discredited they are by some stakeholders, notably by the electronics manufacturing industry. The phasing-out provision does not require the Member States to abolish their levy systems, in the short or long term. In fact, the Directive does not even prefer the TPM over the levy systems.

In recent interventions, EU officials have confirmed that the ultimate objective was not the progressive suppression of the levies regimes, contrary to what the terminology of the 'phasing-out' seems to indicate.¹⁷ According to those interventions, the purpose of the phasing-out provision would be to abolish the obstacles to the economic development of the information society content services. The new technologies give the content retailers the means to design distribution schemes built on a better refined definition of the service offered. Those services may therefore embrace copies of the works those services give access to. In the Commission's view, the coexistence of levy systems may threaten the attractiveness of those services because they may make them appear as requiring a payment or preventing the making of a copy whereas the users think they have already made such a payment when purchasing blank media or devices.

As a result, the phasing-out rule should not act as an incentive for the copyright and related rights owners to opt for TPM, for fear of losing levies revenues. We have seen that the digital private copy could have been outlawed due to the development of technological measures that, for some, 'cure' the market failure of the exceptions. This option was not followed by the EU lawmaker, rightly in our view. Likewise, technical mechanisms prohibiting

¹⁶ With the notable exception of Belgium which has started to envisage an adequate methodology to address the relationship between levies and TPM.

¹⁷ McCreevy, *op. cit.*

copy should not suppress the levies altogether. The exclusive right of reproduction will not be restored over the exception, by the mere availability of technological measures of protection. Should it be the case, the rights holders would be strongly compelled to distribute their works in a locked-up format to avoid the application of the exception and to regain an extended reproduction right. The existence of the private copying exception remains, even though its exercise can be hampered by a technical lock, whose intervention will only influence the levies collection.

The Communication of the EU Commission of 2004 on copyright management also stresses that 'in their present status of implementation, DRMs do not present a policy solution for ensuring the appropriate balance between the interests involved, be they the interests of the authors and other right holders or those of legitimate users, consumers and other third parties involved (libraries, service providers, content creators . . .)' as DRM systems are not in themselves an alternative to copyright policy in setting the parameters either in respect of copyright protection or the exceptions and limitations that are traditionally applied by the 'legislature'.¹⁸ The different interests safeguarded by the levies schemes would thus entail that the application of technological measures on protected works and other subject matter is but one factor in the determination of the method and level of the compensation for private copy.

Lastly, the notion of redundancy or of a double payment that is quite often used to describe the phasing out rule¹⁹ is largely misleading. The term 'payment' arguably refers to a direct remuneration for a determined use, which the levy is not, as seen earlier. As the direct cause of the levy is not the right nor the privilege to make a copy for a determined user but the existence of a prejudice resulting from the private copy exception in copyright laws, which has to be compensated, the technological measures pertaining to works do not suppress the cause of the levies, they only change the extent of the harm which justifies the collection of levies and their scale. Therefore, consideration of the TPM in the levies regime entails evaluating the prejudice caused by private copying as legitimated by the law, and its modification under a technically protected environment. This evaluation of the overall exercise of private copying should be the key criterion when assessing the impact of the TPM on the levy system.

¹⁸ Communication 2004/261 from the Commission to the Council, the European Parliament and the European Economic and Social Committee on the Management of Copyright and Related Rights in the Internal Market, 19 April 2004, point 1.2.5.

¹⁹ Bechtold, *op. cit.*, p. 375; Hugenholtz et al., *op. cit.*, p. 32.

3. Some conundrums brought about by the phasing-out principle

Mirroring the deployment of TPM upon the effectively made private copies and the levies associated thereto reveals a great number of puzzles. Two contradictory logics are indeed conflicting, making rather uneasy the effective implementation of a straightforward interaction between technological protection and compensation for private reproduction.

The levies regime relies on the principle of rough justice: a fair compensation balances a prejudice collectively endured by rights holders, its evaluation can be nothing but global, approximate and collective; it cannot remunerate the copyright owners for each copy that might be made. The basis on which compensation is levied is arbitrarily chosen, though a link with a potentiality to make a copy is present. The remuneration for private copy is therefore not directly connected with the copy that is actually carried out.

Conversely, technological measures apply to single copies of the work and to an individualised act of use. An anti-copy mechanism prevents or allows against remuneration the making of a copy on a determined blank medium or with a reproduction device for which a levy has probably been paid. To some extent, technological measures consist in the exercise of exclusive rights, such exclusivity being the opposite of the compensatory nature of the right organised by levies structures.

The two schemes are largely opposed: a regime of compensation for a collectively endured prejudice (levies) versus the authorisation or prohibition of an individual prejudice (TPM); a potential copy (levies) versus a copy that is effectively made or inhibited (TPM); devices or media liable to remuneration for their potential, but unverified, use (levies) versus the effective implementation and operation of TPM.

These two conflicting logics raise a number of puzzles which make it difficult to reconcile technological measures of protection and the levy system.

3.1 *The consideration of TPM amongst other factors influencing private copying*

A first issue results from the departure point of the levies regime. Based on the potential for prejudice constituted by the private copies that could be legitimately made, the practical organisation of the levies collection should, as a matter of principle, follow an evaluation, albeit essentially approximate, of such prejudice. This explains the determination of media and devices upon which the levy will be collected, as potential means for copying, as well as the level of levies to be collected and the different rates established, depending on the countries, according to the recording capacity of such media or devices.

Ascertaining the influence of TPM on this global regime of levies would normally entail an assessment of the difference brought about by the technical prohibition of copying in terms of the prejudice. In practice two evaluations of

the prejudices should exist, the first being made before TPM, the other after TPM.

This evaluation should however take into account all modifications of the prejudice, that is, anything that has an effect on the practical capacity and perceived need to make private copying. TPM not only intervene as direct inhibitors of the copy, but belong to broader changes in business models of exploitation of protected content. Variations of private copying are likely to occur, not only as a consequence of the presence of a technological prohibition but for other reasons as well. For instance, private copying is certainly increasing in the digital environment, for the copy is now made easier and cheaper, and the available content is becoming more and more profuse. In opposition, some business models can reduce the number of copies being made by the users, by providing the work when and where needed, reducing the usefulness of a permanent copy of the work.

Considering that the application of TPM will forcefully diminish the number of private copies may be easily contradicted if one looks into a more comprehensive analysis of the changes brought about by the digital developments. Applying the phasing-out provision by limiting oneself to consider the revenues or exclusivity regained by the interaction of technological measures would infuse a remunerative logic into the levies system, which will then be very difficult to manage without some level of inconsistency.

3.2 *The need to focus on the benefit of the authors and performers*

Digital Rights Management mechanisms have been advertised as enabling the copyright owners to effectively monitor and manage the uses of their works. Authors, we are told, will soon be able to ask for a remuneration for each use, including each copy, made of their creation. The rule of phasing-out implies that, when a remuneration is asked of users for acts of reproduction, such remuneration is redundant with the levy possibly paid by the user. The levies system should then take that DRM-managed payment into account.

As to authors or performing artists, DRM might not be the panacea that some promote. In most cases, those primary rights owners have waived their rights to producers and other exploiters of their works or performances, and all decisions related to exploitation, including the application of technical protection, are beyond their control. Therefore, should a control of exploitation be regained through the operation of TPM, it would certainly not be for the benefit of the authors and performers, which seems not unfair, considering that the economic rights are now held by others.

However, some countries impose that the authors and performers, as weaker parties in copyright negotiation, be the primary beneficiaries of the compensation resulting from the private copy exception, notably by granting them an unwaivable right to an equitable remuneration for private copying.

When remuneration is paid to get access to the work and to make copies thereof, that payment might be redundant with the levy but it will not eliminate the prejudice endured by the holders of the right of compensation for the private copy, particularly when that right is unwaivable, if they do not see a penny of the money collected by the DRM. Even when the author is legally entitled to waive her right to remuneration for private copies, the remuneration managed by the DRM can be of benefit only to a mere distributor of protected works who is not entitled to such right of remuneration.

We would be of the opinion that the remuneration paid by users as a counterpart to the technical possibility of the copy should be deemed as having an influence on the levies regime only if it can be proven that this remuneration effectively, even partially, benefits the holders of the right of compensation for private copy, be they the producers, authors or performers. If not, prejudice would subsist for those rights holders and would not be compensated by the operation of the TPM.

This leads to a difficulty for it could seem unfair for the user who has indeed paid twice and is not aware of the final recipient of the remuneration said to relate to the possibility of making copies. This demonstrates, once more, that the deployment of technological measures in the protection of works might be more beneficial to exploiters and distributors than to creators themselves.

In order to tackle this perception of unfairness amongst consumers, the phasing-out implementation could well decide that the levy should reflect any double payment of the copy, regardless of who will actually enjoy the remuneration collected by the TPM. This would run afoul from the protection of authors that is at the core both of the copyright regimes (more accurately of the 'author's rights' ones) and of the levy systems.

A better solution would be to insist on the need to associate authors with the application of technological measures as to their works so as they could effectively benefit from the revenues yielded by such systems. In the long term, the revenues collected by TPM being partially enjoyed by authors, one could consider that this payment is redundant with the levies. A promising, though imperfect, example to that effect can be found in French copyright law where a provision requires explicit mention in the contract between authors and producers of the possibility to exploit the works with recourse to TPM.²⁰ Regrettably, such a mandate does not contain any sanction or remedy. However it could generalise a practice of laying down, in copyright contracts

²⁰ Article L. 310-9 of the French Intellectual Property Code. See A. Lucas and H.-J. Lucas, *Traité de propriété littéraire et artistique*, Paris, Litec, 2006, 3rd edition, p. 600, n. 873.

the exploitation in technologically managed models whose remuneration should be fairly divided amongst the creators and the producers or distributors of works.

Not focusing on the adequate benefit of the authors, collective compensation would disappear and leave room for a possible increase of exclusivity over creative content and remunerations that would nonetheless be enjoyed only by exploiters of the works, whereas no significant decrease of private copying could be proven. That would accelerate an evolution of copyright towards an author's right without any author, which has regularly been denounced by copyright scholarship.

3.3 *The scope of the private copy either levied or technically conditioned*

The levy schemes compensate the loss resulting from the private copies made by users, as permitted by the law. This system, which provides some sort of remuneration, albeit minimal, to authors, producers and performers, is limited to the private copy exception. Its effect should not go beyond the legally defined scope of the exception, which means that the levy cannot act as a remuneration for copies not included in the exception realm.

Therefore, the levy system may not serve to remunerate copies or uses that are made illegally.²¹ This might seem unfair since the copyright owner whose works are copied with no authorisation or legal ground in cases where enforcement is difficult to achieve, as in peer-to-peer networks,²² will be in a worse situation than in the case of a legitimate private copy, for which he receives at least some form of compensation. The indiscriminate collection of the levy and the globally made estimation of the copies somewhat conceals the difficulty of establishing a link between the levy and the legitimacy of the copies effectively made. This results from the necessarily rough evaluation of the private copying activities on which the levies system is based.

Conversely, technological measures of protection prohibit or control one act of copy that can be determined and circumscribed. The analysis of what the TPM authorise or prevent could then be more accurate. In other words, whereas the levy system is roughly adjusted to a presumed number of copies, with no possibility of assessing the reality of copying and the practices of

²¹ A. Lucas, 'Observations to the Summary', in *Creators' rights in the information society*, *op. cit.*, p. 605; Hugenholtz et al., *op. cit.*, p. 32.

²² Such an example does not indicate what should be the legal treatment of copies made when downloading works from peer-to-peer networks. The possible application of the exception of private copy to these remains a tricky question, which can also vary from one country to another and in the way the exception is phrased in the copyright law.

users, the role of the TPM, not in terms of the overall copies effectively made, but in terms of what reproduction a determined system can encapsulate, is easier to measure.

When considering the possible effect of a technological measure on the private copy, a first step should thus consist in identifying if the copy inhibited or allowed can qualify as the copy covered by the legal exception. Indeed, it will not be sufficient that the TPM is said to prevent an act of reproduction to conclude that an act of private copy should be subtracted from the overall prejudice endured by the right holders and that the level of levies should subsequently decrease. The reason for this is that TPM generally belong to larger technological and/or business models specifically developed and enabled by digital development where the act of reproduction can have a different legal meaning.

For instance, the acquisition of a digital work, when occurring on-line, will require the user to materialise her purchase, whether on a computer hard disk, on a CD or on any other media or equipment. Contrary to the acquisition of an analogue work where a hard copy is provided to the user, as far as provision of digital work is concerned, the user has to make her own copy of the work. Technically this act of first fixation is a reproduction in the copyright sense, but is one that is authorised by the copyright holder and included in the overall price paid by the acquirer to get access to the work. We have seen that when such copies are allowed by a TPM against some fee, consideration should be given to reducing the level of levies globally collected. However, such reproduction is not a private copy for which a levy should be due, both since it is authorised by the right holder and because it is not, strictly speaking, a private copy, but the necessary embodiment of the work in a physical form.

This certainly holds true for many first fixations of works acquired in digital networks, but it can also be the case for subsequent copies when those are indispensable to normally enjoy the work. While the possession of a musical CD enables the user to listen to that CD on many devices, a work acquired on-line will necessitate the making of different copies, on the many devices on which it can be played. Are all those copies, albeit carried out within the private sphere, to be considered as private copies to be compensated by a levy?

When some uses of the work, not in themselves prohibited by copyright law or by the author, are conditioned upon a reproduction of a work, should not such reproductions be legitimate? This is a reflection that has already been made in the temporary copy discussion: technical acts of fixation, transient or ephemeral, should be included in the normal use of the work and legitimised, either through a rule of exceptions, as was the choice of the EU lawmaker, or as an act exceeding the public exploitation of the work, as

advocated by eminent scholars.²³ Inspired by the exception allowing for temporary copies of digital works when required for their normal use, some countries, such as Belgium or France,²⁴ have required that the technological measures do respect the normal use of the work by the user. These new provisions, limited to the operation of the TPM, have however introduced a new notion in copyright laws, that of the normal use of the work, which could form a new basis for the reassessment of the private copying exception.

Indeed, the phasing-out rule seems to assume that all technical fixations in some way controlled by a technological measure and occurring in the private sphere are private copies. That would lead to a discrepancy between the newly determined level of the levies and the prejudice effectively incurred for the copyright owners. Actually, one could consider that no levy should be set for those copies justified by normal use of work legitimately acquired by the user, as they do not worsen the harm endured by the copyright owners nor should they even be deemed to be private copies. When implementing the phasing-out provision of the European Directive, this should be kept in mind.

4. The practical consideration of the TPM in the levy system

Now that we have envisaged the phasing-out rule, its key principles and the issues it might raise when TPM are confronted to the levies, we can address the methodology that could be followed to take into account the presence of technological measures in the private copy regime.

4.1 *The triggering point of the phasing-out mechanism*

The Directive of 22 May 2001 uses three different formulas to require from Member States consideration of the relationship between levies and TPM. In its article 5(2), one reference is made to the 'application or non-application of technological measures to the work or subject-matter concerned'. Recital 35 of the Directive makes an allusion to *the degree of use* of technological protection measures, whereas Recital 39 makes it sufficient that effective technological measures be *available*. Those three formulas have a different meaning.

Read literally, the criterion of 'application of a TPM to the work or subject-matter concerned' appears to imply that those copyright owners who have

²³ Lucas and Lucas, *op. cit.*, p. 205, n. 245; J. Spoor, 'The Copyright Approach to Copying on the Internet: (Over)stretching the Reproduction Right', in B. Hugenholtz (ed.), *The Future of Copyright in a Digital Environment*, The Hague, Kluwer, 1996, p. 78; B. Hugenholtz, 'Caching and Copyright: The Right of Temporary Copying', *EIPR*, 2000, pp. 482–93.

²⁴ For the analysis of the relevant Belgian and French provisions on normal use, see Dusollier, *op. cit.*, 2d edition, p. 560.

affixed a TPM on their works would not benefit any more from the remuneration right as to these works.²⁵

The standard of application of the TPM, so construed, would in fact raise serious problems of implementation as it would require verifying the presence of TPM on each work released on the national market where the levy regime is organised. Additionally, since all copies (material or immaterial) of a work are not offered via a single distribution path but via different ones, some might have recourse to TPM whereas others do not. Moreover, such an inventory of the technical protected works might be almost impossible to realise as authors may sometimes not even know about the TPM applied to their works as they are seldom associated with such an application, which is mainly operated by entrepreneurs of content provision platforms.

But most important is the fact that such an interpretation of the phasing-out provision is inconsistent with the above-mentioned global compensative nature of the levy system. Such a global nature is as a matter of fact the solution provided to the impossible treatment of individual acts of private copying. Faced with impossible individual control and remuneration of those acts, no direct remuneration system but a collective one could provide a counterpart to acts of private copying. There is therefore no individual economic link between the levy paid by the user when purchasing blank media, the works copied by such a user, and the sums collected through the system by the authors of those particular works. Corresponding to the absence of such an individual economic link is the absence of a legal individual link between the author of a work and a user making a copy of that work. The former is not the creditor of the levies paid by the latter when making a copy of his work. Hence, replicating the presence of a TPM on a determined work in the levy system, by decreasing the levy paid by the user of such a work, would contradict the collective logic that characterises it and would not be easy to achieve.

Because of this logical impracticability, taking the application of TPM into account in the levy system should rather refer to the 'degree of use' of the TPM, which is also referred to in the European text.²⁶

Referring to the degree of use of TPM, alongside their application to works, would mean assessing the extent of use of technological measures to protect works. In practice, assessing the application of TPM by looking at the degree of use involves carrying out a statistical approach to the deployment and use of TPM in markets of exploitation of copyrighted works. The more works are protected against copying in some modes of distribution, the less high the level of levies should be.

²⁵ Hugenholtz et al., *op. cit.*, p. 42.

²⁶ *Ibid.*

A segmented approach, that is, an assessment of the presence of TPM in differentiated markets for copyrighted works (primarily the markets for musical works, audiovisual works, subsidiarily the markets for literary works, visual and photographic works, and others), would allow for more fine-tuning of such degree of use.

Different reasons justify such a sector-based approach. First, it is consistent with the fact the TPM strategies are generally uniform within a given class of works, following the distribution schemes adopted for each particular class of works. Second, a sector-based assessment of the TPM utilisation is also necessary to verify that such utilisation has indeed the consequence of reducing the relative share of the consumption schemes that are typical sources of private copies, among the whole quantity of works utilised. As a matter of fact, a technically protected distribution scheme is likely to achieve a reduction in the number of private copies made (i.e. the sphere of uncontrolled acts of utilization) under two conditions. This protected source of works must come about in place of an unprotected one and it also must be a significant source of private copies (before being partially or totally substituted by the technically protected source of work). Hence it is necessary to measure the dissemination of protected schemes of work distribution per class of work, as this substitution phenomenon naturally occurs within each class of works. For instance, a TPM applied to a literary works distribution scheme will obviously not substitute for a distribution scheme of sound works.

Lastly, the pertinence of such a segmented approach to the market also derives from the fact that it permits integrating the differences in the TPM strategies within each class of works, when distributing the levies collected between those different classes of works. The use of TPM being different from one class of works to another, the allocation of collected levies between the classes of authors should reflect the TPM strategies of the given sector.

To be exhaustive, it should be recalled that a third interpretation of the phasing-out provision has been proposed.²⁷ It would arise out of Recital 39 of the Directive suggesting that 'when applying the exception or limitation on private copying, Member States should take due account of technological and economic developments, in particular with respect to digital private copying and remuneration schemes, when effective technological protection measures are available'.

However, the object of this recital appears to be the exception itself and has no relationship indeed with the determination of the fair compensation commanded by article 5(2)(b). The irrelevance of the standard of availability also arises from the fact that the sole availability of a TPM does not in itself

seem likely to limit the use of the exception, and the subsequent prejudice. It is thus in no position to originate a reduction of the levies.

Most important though is that an available but not applied TPM will not cause an undue payment of a levy. A TPM may be available for copyright owners to apply to their works, yet when not effectively affixed to a work, the making of a copy or the management of remuneration for the copy will not be prevented. Then, the two hypotheses that the phasing-out provision precisely aims to tackle will never occur only because of the mere availability of a TPM. Additionally, opting for such a standard would incite rights owners to distribute their works in a technically protected format, when such options are available, since they will lose the benefit of levies irrespective of their actual recourse to TPM.

4.2 *The effect of TPM on the private copying exception*

The European Directive requires the taking into account of the technological measures for organising the levies system, but it does not define which technological measures are to be considered. For obvious reasons, only TPM having an effect on the exception will be taken into account. This effect on the exception may be direct or indirect.

Some TPM have a direct effect on the use of the exception, prohibiting the realisation of any private copy or limiting the number of them. A straightforward example is the anti-copy mechanism embedded in DVD, or that formerly used for protecting musical CDs. The new generation of digital format for audiovisual works, the HD-DVD or Blu-Ray, also includes an anti-copy device that can be devised to allow for one copy. Such TPM limiting the number of admissible copies equally reduces the possibility of private copying, albeit to a lesser extent than TPM that inhibit completely the making of any copy. By limiting or preventing the making of copies, those TPM convey control by authors over the acts of reproduction, hence contributing to a reduction in the global use of the private copy exception, as well as the prejudice to be compensated by the levies.

But TPM may also present an indirect effect, sometimes less obvious, on the exception. A first hypothesis is when the TPM withhold payment as a counterpart of the copy to be made by the user.

In most cases, the technological measure belongs to an overall system of distribution of works and management of the prices to pay to get access to works, such as in platforms for downloading music, on-demand video services or pay-per-use models.

From the user's point of view, part of the price she pays to the retailer may appear to be in compensation for the possibility to make copies. This copy-against-remuneration model is the second hypothesis addressed by the phasing-out provision. The user having paid for the copy, it appears to be

²⁷ Hugenholtz et al., *op. cit.*, p. 44.

redundant with the payment of levies when purchasing a blank media or device. The use of such TPM should therefore entail a reduction of the amount of levies collected. This is recalled by one recital of the European Directive of 2001 that states that: 'in cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due'.²⁸

However, this effect on the private copy levies should be qualified in two ways. On one hand, the price paid by the user may not be the counterpart of the private copies she will eventually carry out, but a fixed price for access to the work, whatever can be done with that work. Some link between the remuneration paid by the user and the private copies she will make should ideally be established in order to be able to consider that such a fee effectively remunerates for the private copies that the system allows, and not simply for access to the work and for its first acquisition. On the other hand, as we have highlighted above, the remuneration collected by the distributor of the work might not return, even in part, to the copyright owners entitled to the remuneration for private copying. In such a case, the making of the copy still harms the copyright owner, with no compensation, even though the user might perceive that she has remunerated that copy. The royalties allocated to rights owners for the licences they have granted to such forms of exploitation might only cover the remuneration of rights needed to distribute works on-line, but not the private copy.

Reducing the level of the levies in consequence of the utilisation of that kind of TPM may therefore be inconsistent with the rationale of the phasing-out provision which requires only the payments that would provide compensation to the authors and other rights holders be taken into account.

This inconsistency concerns the logic of the levy system itself: if the TPM does not permit authors to get remuneration as a counterpart of the acts of use of their works, this TPM does not convey restored control over the acts of private copies. There is no reason then to diminish the remuneration they receive from the levy system, as such a reduction should only occur when the prejudice endured by the authors has equally decreased.

The second kind of indirect effect happens when the business and technical model of distribution of works undermines the attractiveness or usefulness of private copying. New digital modes of exploitation of copyrighted works may indeed provide the work with an unprecedented set of possibilities as to the format in which the work can be listened to or viewed, the time or the place. For instance, pay-per-use provision of works may induce the consumer to get access to the work whenever he wants to use it, with no need to get a perma-

nent copy thereof. Some digital television services broadcast some programmes several times at different times, even on demand in some cases, or offer a catch-up option that gives the user the possibility to postpone the viewing of a programme.²⁹

The indirect effect on the exception resulting from all these models consists in the fact that they may reduce the interest of realising a private copy for time-shifting, format-shifting or portability reasons. When works are exploited in models where more options of access to works are provided to the user, it will diminish the number of private copies that the user used to carry out either to play the content at another time (time-shifting) or to have different copies of the work to get access to in different locations (portability) or in different formats (format-shifting). As a whole, with the number of private copies decreasing, the overall prejudice will be reduced as well, which would justify consequences for the regime of levies.

Those types of TPM, or rather the TPM included in such models, should therefore influence the design of the levy system.

4.3 *Other factors to take into consideration*

In considering the effect of TPM on levies systems, besides the key factors of the degree of use of the technological measure and its direct or indirect effect on private copying, other aspects may be relevant:

- the substitution of a consumption mode that applies a TPM to a mode that does not: the dissemination of the TPM that has an effect on the private copy should be taken into account in the levy system on condition that the media or the distribution mode that uses that TPM does not just come in addition to modes of exploitation that were not protected against copying, but substitutes for them. One example may be found in the development of certain content services for mobiles, which often make use of a TPM preventing the content to be transferred onto another player device. On the hypothesis that these services are used to purchase

²⁸ Recital 35.

²⁹ This interactivity is given by the technical possibility of interrupting the viewing of a programme played at a time fixed by the provider of the service, up to some limited time (e.g. 2 hours). It is usually realised via a temporary recording of the programmes played on the hard drive of the set-top box. It should be noted that this characteristic may imply that such a technical system could be considered as also presenting the above-mentioned indirect effect on the exception (i.e. a TPM that charges the user for the copies he is allowed to make). It may indeed be considered that the recording of the programme constitutes a private copy and that the subscription to the service of television comprises a counterpart to this service of recording.

content on mobile devices, it may be assumed³⁰ that they will not be used as substitutes for traditional unprotected television services, given the fact that mobile services and traditional television services pursue totally different users' needs. The development of protected mobile services may therefore have no effect on the global quantity of private copies made by the users of audiovisual contents, if the consumption of traditional television services is not shrunk by such a development;

- it should also be noted that the repercussions of a TPM on the levy system might also be impeded if its substitution effect is limited to a consumption mode that is equally protected against the copy (e.g. the protected HD-DVD that will likely replace the DVD format). This necessary substitution effect of a protected service or media also implies that, to be considered, a TPM should come as a substitute for a medium or service that is in fact the source of private copying. Radio broadcasting illustrates this assertion. Although the development of protected digital radio services (i.e. streaming) may come to replace the unprotected analogue radio, a diminishing use of the exception might not occur as the latter is no longer a significant source of copying;
- the voluntary measures adopted by the right holders in execution of article 6(4) of the Directive: article 6(4) of the Directive encourages right holders to allow for private copying, despite the presence of a TPM, and allows Member States to set up mechanisms to grant such privilege to users. When right owners or Member States have taken such appropriate measures, private copying can occur, even though it was originally inhibited by the TPM governing the distribution of the work. In that case, the recovered possibility to make a reproduction of the work has the reverse effect on the prejudice to be compensated by the levies;
- the definition of the levy basis (i.e. an inventory of the categories of recording devices and/or blank media that are submitted to levy) can also integrate the fact that a TPM is included in such media or devices. It would then require that the media or device including the TPM would render private copying totally impossible. That might be the case with, for instance, a portable player device that is bound to a content service provider and that makes it impossible to copy all content downloaded on that device. Insofar as all the copies taking place within that content service have been prohibited or compensated through the TPM and if the reproduction feature of the device cannot be used on unprotected content, one would assume that such a device should be excluded from the levy base;

³⁰ Such an assumption should however be confirmed by consumption surveys.

- the variation of acquisition of blank media or recording devices: should the practical possibility of making copies of works diminish due to the operation of anti-copy TPM, the level of levies collected would also decrease. Therefore, the effect of the TPM on the levies might be, to some extent, automatic.³¹ A reduction of the rate of the levies on such blank media would then be redundant. The same is not true for recording devices, as most of the time they have other functions besides copying, nor for media of great capacity of storage (e.g. external hard disk drive) as the amount of units purchased will be less influenced by the number of copies to be realised.

Conclusion

What makes it difficult for the phasing-out principle to fulfil all its promises is the already fragile ground on which it is transplanted. Private copy is one of those areas in copyright that are the most challenged in the digital environment. Yet, for political reasons, it has not been touched by the European Directive on copyright in the information society, whose very purpose was to address some challenges and provide adequate answers to them.

That the adaptation of the levies system is difficult to accomplish in national laws will come as no surprise. The main hurdles or concerns result from the fact that technological measures are not, despite the marketing of the industry, realised by copyright owners, but mostly by mere distributors of digital content, and certainly not by authors or performing artists; that the systems put in place to monitor the usage of the work less and less prohibit the making of copies, but allow them against a remuneration, reduce the need to make such copies, or monitor the making of fixations that can uneasily be qualified as private copying.

For all these reasons, technological measures cannot be said to take over the compensation provided by the levies by substituting for it a plain return of the exclusive right of reproduction. Fields of operation for the compensation ensured by the levy where the author is not entitled to exercise his rights and of the control the latter can assume through technical methods are much more intertwined. The phasing-out provision takes for granted that technique will basically occupy the vacancies left by levies. This is both a simplification and propaganda.

To take a real account of the technological measures protecting works and other subject matter, a preliminary step should be required, that is, an effective assessment of private copying in the digital environment. We would argue that

³¹ All things being equal, since the sales of blank media can increase for other reasons.

this could lead to differentiating more subtly between those reproductions that shall be included within the scope of the exception or those that shall not.

The notion of normal use should namely be investigated so as to create a new exception in copyright law which would permit the reproduction of a work where it is required to normally enjoy it. This new exception would make legitimate all acts of normal use of the work, irrespective of the path they take and the possible technical reproduction they engender. Such reproductions might not be submitted to a levy, according to the three-step test, since they will not cause any prejudice to the copyright owners, being only the normal consequence of the legitimate acquisition of a work for which they have been generally remunerated. That would leave other copies made within the private sphere that may cause a prejudice to the rights holders, still to be compensated by a levy. Only after such a reassessment of digital copying should we look into the effect of technological measures on that second type of copy and report it on the levies system.

This reflection about the private copy should also take place within a broader consideration of the digital exploitation of the work and the part occupied by the levies in the revenues of the authors and performing artists. As clearly pointed out by T. Dreier, 'at any rate, it seems that the question of adequate participation of individual authors in the proceeds of the exploitation of their works cannot be dissociated from the issues of levies and/or DRM'.³² Consumers and the electronics manufacturing industry are pushing for the levies to be suppressed or reduced. This should not be done to the detriment of the creators.

In the absence of such an analysis of private copying and of a proper consideration of the interests of the authors, the phasing-out rule would only be a cure administered to the wrong illness.

³² T. Dreier, 'Summary', in *Creators' Rights in the Information Society*, *op. cit.*, p. 588.